Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JESSE HINOJOSA GONZALES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH COURT OF APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari and reverse Petitioner's convictions where in his closing arguments during Petitioner's guilt-innocence and punishment phases of trial, the prosecutor argued that the Petitioner hired trial counsel because he was guilty, accused trial counsel of aiding Petitioner in concocting a fraudulent theory of defense, and exposed matters to the jury that were covered by the attorney-client privilege, thus depriving Petitioner of his Sixth Amendment right to counsel, in a manner that was harmful per se?

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PRAYER

The Petitioner, **JESSE HINOJOSA GONZALES,** respectfully prays that a writ of certiorari be granted to review the judgment of the Fourth Court of Appeals of Texas.

OPINIONS BELOW

On August 17th 2005, the Fourth Court of Appeals of Texas issued an unpublished opinion affirming Petitioner's convictions. *State v. Gonzales*, 2005 Tex. App. LEXIS 6547 (Ct. App. San Antonio – August 17th, 2005)(not designated for publication). On February 1st, 2006, the Texas Court of Criminal Appeals refused his petition for discretionary review of the appellate court's decision.

BASIS OF FEDERAL JURISDICTION

On August 17th, 2005, the Fourth Court of Appeals of Texas entered its judgment and opinion affirming Petitioner's convictions. On February 1st, 2006, the Texas Court of Criminal Appeals refused his petition for discretionary review of the appellate court's decision. The jurisdiction of this Court is thus invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Mr. Gonzales' petition implicates the Sixth Amendment to the United States Constitution, which provides as follows:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Course of the Proceedings:

The State of Texas charged Petitioner, Jesse Hinojosa Gonzales (Mr. Gonzales) with two counts of bribery, each second degree felonies under Section 34.06 of the Texas Penal Code, and one count of money laundering, a third degree felony under Section 34.02 of the Penal Code, in the 175th District Court of Bexar County, Texas. Petitioner was tried before a jury in both the guilt-innocence and punishment phases of trial. The jury convicted him of all three counts and sentenced him to twelve years and a ten thousand dollar fine for each bribery count, and to ten years and a ten thousand dollar fine for the money laundering count, with all sentences running concurrent. He timely appealed his convictions to the San Antonio Fourth Court of Appeals.

On August 17th, 2005, the Fourth Court of Appeals affirmed Petitioner's convictions and sentence via unpublished opinion. *See Gonzales v. State*, 2005 Tex. App. LEXIS 6547 (Ct. App. San Antonio – August 17th, 2005)(not designated for publication). No motion for rehearing was filed. On February 1st, 2006, the Texas Court of Criminal Appeals refused his timely petition for discretionary review. His petition for writ of certiorari is due to be filed by May 2nd, 2006.

B. Statement of the Relevant Facts:

1. Background:

Mr. Gonzales' defense to the charges was based on a voluntary statement he gave to Shawn Palmer, a Texas Ranger, on March 4th, 2002. In it, he related certain transactions during which he was offered, and he accepted moneys, in exchange for his favorable vote as trustee of the Alamo Community College

District to award contracts. He was later indicted on the charges that are the subject of this petition. The statement was introduced into evidence, and made part of the record at his trial. *See* Exhibit 30 of Reporter's Record (RR) on Appeal, "Witness Statement." Mr. Gonzales testified in his defense that the actions described in the statement were part of his efforts to uncover, and ultimately expose corruption to law enforcement.

2. Trial Facts:

During opening of closing arguments, the Prosecutor argued:

> Let me show you something very quickly. Oh, I need to point one more thing out to you. He (Mr. Gonzales) sits there and tells you – Your Honor, may I have three more minutes? [Court grants request] Thank you, Your Honor. He (Petitioner) sits there and tells you this whole time, I didn't have a lawyer. I didn't know what I was doing. **Think about how he shades the truth. He gave his statement to the Texas Ranger, which is State's Exhibit Number 30, on the afternoon of March the 4th, A.D., 2002. That's when he gave that statement to the Texas Ranger.** And in his own certified campaign reports that he swore to under oath, which is State's Exhibit Number 21, I believe it's 21. Pardon me. If I can find it here. Well, in this document you will see – if I can look through here. You will look through here and you will see **there is a payment made to Fred Rodriguez (trial counsel) right here, which is State's Exhibit Number 21, for legal services. That is dated March the 4th of '02. The same day that he gave his statement to the Texas Rangers, this man who said I didn't know I needed a lawyer**, this man who says I didn't know what affirmed means, this man who says

even though I've got a law enforcement background, this man who says I didn't really know I was giving a sworn statement, oh, but it's the truth, but I didn't know it was a sworn statement. **This man had the sense to go see Fred Rodriguez** (trial counsel) **before he went to see the Texas Ranger.** Don't believe the stuff about how naive and innocent this guy is. **He sits there and tells you he didn't know he needed a lawyer. He knew he needed a lawyer. He knew he needed a lawyer. That's what he was doing. This has all been part of an orchestrated plan by him to come forward and say I was really working with law enforcement. That's what he's trying to do. He has been working on this defense for a long time. Once that spotlight hit him, he started working on that defense.** I told you I would show you this foam board, and I'm going to do it right now fast. All this shows is what has already been admitted into evidence. This is August 14th. He asked the first bribe from Rick Sheldon. Late September and October he starts talking at Tinker's Grill about wanting that $10,000.00 bucks. He doesn't do anything to get law enforcement involved. November 5th he gets the first payment, he gets a $5,000.00 payment in cash from Louis Cruz. November 7th he starts spending the money. November 7th. November 9th he starts spending the money. February 26th he gets – he resigns from the vice chair of ACCD rather than being kicked out. And Gloria Padilla starts covering the story. February 28th he files his revised campaign report to start bringing this information out so he can start pointing the finger at Tinker Garza. **March 4th he meets with attorney Fred Rodriguez and provides a sworn statement to Texas Ranger Shawn Palmer.** March 6th, that first article comes out about this bribe...

See RR Vol. 9, p. 110-112 on appeal (Emphasis added). Mr. Fred Rodriguez, Petitioner's trial counsel, did not object to the prosecutor's comments. Instead, during his portion of closing argument, he responded:

> Thank you. When the shoe gets tight, you know, you've got to come up with some other reasons. And sometimes we unwittingly help each other. We don't intend to, but we do. I had forgotten this point. I had forgotten that Jesse Gonzales came to see, according to the evidence, Fred Rodriguez, and you are probable guessing it's me, and it would probably be a good guess. Now, do you think that any criminal lawyer who talks to a person that says he's going to go talk to the Texas Rangers is going to let him go, if he's going to go and confess to crime? Do you think anybody would let that happen? There is no evidence here as to what took place. So, I can't get into it. But we know one thing. He showed up at the Ranger Office by himself. No lawyer with him. By himself. Do you think he intended to go out there and confess to a crime after having talked to a criminal defense attorney? You can use your common citizens, folks. You can use your common sense.

RR Vol 9, p. 134-135 (Emphasis added). Mr. Gonzales was convicted of both bribery counts, and the remaining money laundering charge. In the rebuttal stage of the state's closing arguments before the same jury during the punishment phase of trial, the prosecutor continued with the following:

> Mr. Gonzales did nothing but go in and try to use the Texas Rangers and use the law enforcement system to cover his tracks. **From the day that he met with the Texas Rangers, he had a lawyer behind the scenes. And every time Jesse Gonzales called Shawn Palmer**

> **and gave him some little tidbit of information, some little adulterous affair by Chancellor Ramsay or something, they logged it down and counted it. Oh wow, he's called the Ranger 22 times, tomorrow 23 times. When we finally get to Court on this deal, we'll be able to say he was cooperating."**

RR Vol 10, p. 134 (Emphasis added). Mr. Rodriguez did not object to, or otherwise address the prosecutor's accusations during the punishment phase.

3. Fourth Court of Appeals Opinion:

On appeal to the Fourth Court of Appeals of Texas, Mr. Gonzales argued:

> The prosecutor committed fundamental error, in violation of the Appellant's right to counsel, as provided by the Sixth Amendment to the United States Constitution, when it implied the Appellant's guilt from his hiring trial counsel, when it made this allegation in connection with the Appellant's defense theory, and when it attacked the Appellant through his trial counsel.

See "Brief for Appellant (AB)," p. 13. Mr. Gonzales' Sixth Amendment complaint was presented in his first and ninth points of error *See Id.* ps. 16, 69. [1] Conceding that Mr. Rodriguez did not object and preserve the issue for appeal, Mr. Gonzales argued that pursuant to the Texas Court of Criminal Appeals decision in *Marin v. State*, the appellate court should

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[1] In his ninth point of error on appeal, Mr. Gonzales alternatively argued that the prosecutor's closing arguments during the punishment phase required a reversal of his sentence, thus meriting a new punishment hearing.

consider the merits of Mr. Gonzales' complaint because the prosecutor's conduct constituted fundamental error, namely, the deprivation of his right to counsel at trial. *See Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993)(overruled on other grounds by *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997)).

In support of his arguments Mr. Gonzales urged the appellate court to follow the Fifth Circuit's opinion in *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980). There, although McDonald's attorney did not object to the prosecutor's arguments, the Circuit Court found that "[b]ecause the alleged errors affect[ed] McDonald's substantial constitutional rights, [the Court] may notice them even though they were not brought to the trial court's attention. *Id.* at 562. (citing Fed.R.Crim.P. 52(b)).[2] "The implication that McDonald had destroyed incriminating evidence," added the panel, "struck at the jugular of his exculpatory story, the essence of which was that there was no evidence to destroy." *Id.* The Court explained that its decision "fully extend[ed]" this reasoning "to cases involving comments on a defendant's exercise of his right to counsel," and that "[t]he dividing line...separates comments that 'strike at the jugular' of a defendant's story and those dealing only tangentially with it.'" *Id.* As to the government's harmless error argument, the Court responded that while "[v]iolations of some constitutional rights may be considered harmless errors (citing *Chapman v. California*, 386 U.S. 18 (1967),...'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Id.* (citing *Chapman* at 23). It identified the prosecutor's actions as "harmful per se (*Id.* (referring to *United*

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[2] "(b) Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

States v. Hammond, 598 F.2d 1008 (5th Cir. 1979))" and reversed McDonald's conviction, holding that "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error." *Id.*

Mr. Gonzales argued that the prosecutors actions went far beyond the offending conduct in *McDonald*, by actually accusing Mr. Rodriguez of aiding Mr. Gonzales in concocting a false defense with the aid of his lawyer, and through baseless accusations, compelling Mr. Rodriguez' to discuss with the jury matters covered by the attorney client privilege. *See* AB p.32-34.

In its opinion the Fourth Court of Appeals of Texas acknowledged that just as Fed. R. Crim. P. 52(b) expressly permits consideration of "plain error that affects substantial rights" "even though it was not brought to the court's attention," "[t]he Texas Court of Criminal Appeals also recognizes that certain errors are fundamental and need not be preserved." *See Gonzales v. State*, 2005 Tex. App. LEXIS 6547 at *2-3(Ct. App. San Antonio – August 17th, 2005)(not designated for publication)(citing *Marin* at 280). However, it concluded that the Court of Criminal Appeals "has expressly held that this class of errors does not include improper jury argument, even when it is argued to infringe upon a defendant's exercise of his constitutional right to counsel." *Gonzales* at *3 (citing *Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004))(holding that defendant's failure to object waived complaint "that the prosecutor erred by arguing at the guilt or innocence phase in such a way as to strike at appellant over the shoulders of his counsel"). It declared itself "bound by *Threadgill*," holding that, by failing to object, Mr. Gonzales waived his deprivation of right to counsel complaints. In sum, the appellate court rejected Mr. Gonzales' Sixth Amendment challenge as procedurally barred.

Mr. Gonzales timely raised his Sixth Amendment challenge

in a petition for discretionary review, which was refused on February 1st, 2006.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT HAS NEVER ADDRESSED THE EFFECTS OF A PROSECUTOR'S JURY ARGUMENT ON A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL. THE FOURTH COURT OF APPEALS OF TEXAS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER THAT CONFLICTS WITH SIXTH AMENDMENT PRECEDENT FROM THE SUPREME COURT AND OTHER CIRCUIT COURTS, AND HAS DECIDED AN IMPORTANT QUESTION OF LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

A. Jurisdiction:

As the United States Supreme Court "[has]indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [the Supreme Court's] jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)(citations omitted). In *Ake*, the Supreme Court noted that the Oklahoma waiver rule did not apply to fundamental trial error. *Id.* at 74. (citations omitted). *Ake* elaborated that the State of Oklahoma made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error had been committed. *Id.* at 75. Before applying the waiver doctrine to a constitutional question, the state court was required to rule, either explicitly or implicitly, on the merits of the constitutional question, making the

federal-law holding integral to the state court's disposition of the matter, and consequently, "[did] not present an independent state ground for the decision rendered." *Id.* The Supreme Court then considered the merits of Ake's claim.

As acknowledged by the Fourth Court of Appeals of Texas, just as Fed. R. Crim. P. 52(b) expressly permits consideration of "plain error that affects substantial rights" "even though it was not brought to the court's attention," the Texas Court of Criminal Appeals also recognizes that certain errors are fundamental and need not be preserved. *See Gonzales* at *2-3 (citing *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993) *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997)). In *Marin*, the Court of Criminal Appeals elaborated:

> As we have previously stated, "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system (citing Texas Rule of Evidence 103(d)). A principle characteristic of these rights is that they cannot be forfeited. That is to say, they are not extinguished by inaction alone. Instead, if a defendant wants to relinquish one or more of them, he must do so expressly. **His rights to the assistance of counsel** and to a jury trial are of this kind.

See Marin, 851 S.W.2d at 279-80)(Emphasis added). More recently, in *Blue v. State*, the Texas Court of Criminal Appeals wrote that while "the **general rule** is that counsel must object to the trial judge's comments during trial in order to preserve error (Tex. R. App. P. 33.1.) [3]..., pursuant to Texas Rule of

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[3] *See also McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998); *Valencia v. State*, 946 S.W.2d 81 (Tex. Crim. App. 1997); *Rabago v. State*, 75 S.W.3d 561, 561 (Ct. App. San Antonio – 2002)(As a general

Evidence 103(d), the [appellate courts] are authorized to 'take notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.'" *See Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2000)(citing *Marin* at 278; *Cain* at 264)(Emphasis added). In *Blue*, the Court determined that "[t]he comments of the trial judge, which tainted Blue's presumption of innocence in front of the venire panel, were fundamental error of constitutional dimension and required no objection." *Blue* at 132.

Blue is significant because it represents the most recent in a growing list of "absolute requirements" that have been recognized by the Court of Criminal Appeals since *Marin*, which includes the constitutional prohibition of ex post facto laws (see *Aldrich v. State*, 104 S.W.3d 890, 895 (Tex. Crim. App. 2003))(citations omitted), for which a complaint need not be preserved at trial in order to be considered for the first time on direct appeal. *Blue* is also significant because it demonstrates the Court of Criminal Appeals' reliance on federal precedent to determine whether fundamental error has been committed. For example, one of the opinions relied on in *Blue* for its holding was *United States v. Bray*, from the Tenth Circuit Court of Appeals, which held that by setting bail within

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rule, trial counsel must object to preserve error, even if is "incurable" or "constitutional."); *Harris v. State*, 125 S.W.3d 45, 48 (Ct. App. Austin – 2003)(same); *Roberson v. State*, 2005 Tex. App. LEXIS 2456 * 12-13 (Ct. App. – Tyler 2005)(same); *Loera v. State* 2004 LEXIS 2228 * 3 (Ct. App. Dallas – 2004)(not designated for publication)(same); *Archie . State*, 2003 LEXIS 9284 at * 3 (Ct. App. Houston [1st Dist.] – October 30th, 2003)(not designated for publication)(same); *Wead v. State*, 94 S.W.3d 131, 136 (Ct. App. Corpus Christi – 2002)(overruled on other grounds)(As a general rule, to raise a jury argument complaint on appeal an appellant must show he objected and pursued his objection to an adverse ruling); *Lange v. State*, 57 S.W.3d 458, 467 (Amarillo – 2001)(The general rule is that any error in improper jury argument is waived by the failure to make a timely and proper objection).

the jury's presence and admonishing the marshals to "lock him up" if bail was not met, the trial court "'vitiated [Bray's] presumption of innocence.'" *See Blue*, at 132. (citing *United States v. Bray* 546 F.2d 851 at 859 (10th Cir. 1976). [4] *Compare Stewart v. Smith*, 536 U.S. 856, 859-60 (2002)(Arizona's rule of procedural default ("Arizona Rule of Criminal Procedure 32.2(a)(3) does not require a decision on the merits of the claim, "i.e., whether the right was actually violated, but only need to identify what type of claim it is, and there is no indication that this identification is based on an interpretation of what federal law requires.")(citations omitted).

With this background, the Fourth Court of Appeals misapplied *Threadgill* as authority that barred review of Mr. Gonzales' claim on appeal. While *Threadgill* alleged "that the prosecutor erred by arguing at the guilt or innocence phase in such a way as to strike at appellant over the shoulders of his counsel," he did not allege that the comments were of the magnitude of fundamental error. Implicit in this distinction is the fact that while some improper jury arguments about defense counsel may be cured by instruction, and be therefore subject to Texas' general rule of procedural default, attacks of the kind

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[4] *Blue* also cited the following cases as authority: "*United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969) (actions of trial judge who improperly injected himself into role of prosecutor during trial destroyed neutrality and impartiality of trial atmosphere, defendant's credibility, and defendant's presumption of innocence, and constituted plain error); *United States v. Haywood*, 411 F.2d 555 (5th Cir. 1969)(trial judge who, in presence of jury, twice interrupted charge and informed defendant of right to allocution, before case was submitted to jury for decision effectively destroyed defendant's presumption of innocence and committed plain error); *see also United States v. Filani*, 74 F.3d 378 (2d Cir. 1996) (trial court's extended and critical questioning of defendant gave jury impression of partiality and was plain error); *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974) (prosecutor's argument that sought to impose a "presumption of guilt," together with failure of charge to instruct on the presumption of innocence, was plain error). *See Blue*, at 132-133.

levied against Mr. Gonzales' counsel during his trial are egregious as to result in a total deprivation of counsel, amounting to fundamental error that need not be preserved to be considered on appeal. Furthermore, contrary to the Fourth Court of Appeals assertion in *Gonzales*, neither *Marin,* Texas Rule of Evidence 103(d), or even *Threadgill* identifies improper jury argument as a "class of error" in determining the existence of fundamental error. The Fourth Court's interpretation conflicts with the holdings, and very existence of *Marin* and *Blue*, and demonstrates that, as it pertains to the identification and determination of fundamental error claims in Texas, its application of the procedural default rule is not "firmly established and regularly followed." *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991)("only a 'firmly established and regularly followed state practice" may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim((quoting *James v. Kentucky*, 466 U.S. 341, 348-351(1984)). Thus, this Court has jurisdiction to consider the merits of Mr. Gonzales' petition.

B. The prosecutor violated Mr. Gonzales' Sixth Amendment right to counsel because he argued that Mr. Gonzales hired his trial counsel to help him prepare a false statement for law enforcement, and that he helped Mr. Gonzales present a false defense at trial, while attacking the jugular of his defense:

1. Supreme Court Precedent:

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. *United States v. Cronic*, 466 U.S. 648, 653 (1984). Lawyers in

criminal cases "are necessities, not luxuries." *Id.* [5] Their presence is essential because they are the means through which the other rights of the person on trial are secured. *Id.* As the Supreme Court has repeatedly recognized, without counsel, the right to a trial itself would be "of little avail." *Id.* at 653-54.[6]

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[5] *Citing Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)("That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.").

[6] "Time has not eroded the force of Justice Sutherland's opinion for the Court in *Powell v. Alabama*, 287 U.S. 45 (1932):

> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.'

Id., at 68-69."

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Id.* (citation omitted).

"Some constitutional violations...by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988)(citations omitted). Sixth Amendment violations that pervade the entire proceeding fall within this category. *Id. See Holloway v. Arkansas*, 435 U.S. 475(1978)(conflict of interest in representation throughout entire proceeding); *Chapman* at 23, n. 8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)(total deprivation of counsel throughout entire proceeding)); *White v. Maryland*, 373 U.S. 59 (1963)(absence of counsel from arraignment proceeding that affected entire trial because defenses not asserted were irretrievably lost); *Hamilton v. Alabama*, 368 U.S. 52 (1961)(same).

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. *Id.* The right to counsel, however, is not merely the right to have counsel physically present. Rather, **"the right to counsel is the right to the effective assistance of counsel."** *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)(emphasis by Mr. Gonzales)).

There are a number of cases where this Court found Sixth Amendment error without requiring a showing of prejudice involving criminal defendants who had "actually or constructively been denied counsel by government action." *Bell v. Cone*, 535 U.S. 685, 696 n. 3 (2003)(citing *United States v. Cronic*, 466 U.S. 648, 659, n. 25 (1984)). In these cases, the

Court has found a violation of the right to counsel meriting automatic reversal when the deprivation took place during a specific stage of trial. For example this Court found a violation of the right to counsel meriting automatic reversal where the trial court, at the urging of a prosecutor, prohibited all communications with his client during an overnight trial recess, while the defendant was on direct examination by his lawyer (*Geders v. United States*, 425 U.S. 80 (1976); where a state statute allowed the trial judge to deny closing arguments at trial (*Herring v. New York*, 422 U.S. 853, 865 (1975); and where a state law required a defendant to testify first at trial or not at all (*Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972). *Id.*

2. The Fifth Circuit's holding in *United States v. McDonald* and its reliance on precedent from the Supreme Court, as well as from the Third, Eighth, and D.C. Circuits:

In *United States v. McDonald*, James Ray McDonald was convicted by a jury on one count of dealing in counterfeit currency and on one count of conspiring to deal in counterfeit currency. *See United States v. McDonald*, 620 F.2d 559, at 560 (5th Cir. 1980). On appeal, McDonald argued that "the prosecutor transgressed his Sixth Amendment right to counsel by eliciting testimony that his lawyer was present when Secret Service agents executed a search warrant at his home and by commenting on that fact during closing arguments." *McDonald*, at 560.

At trial McDonald sought to establish that although he had been aware that his co-indictees, Head and Burns, were engaged in a counterfeiting scheme, he was not a participant. *Id.* Defense counsel explained that the latter had become aware that Secret Service agents were watching them and that they had gone to McDonald's house to burn the evidence against them. *Id.* Counsel contended that McDonald merely had

acquiesced in their efforts to cover their tracks. *Id.* During closing argument defense counsel stressed that the Secret Service agents had found no evidence against McDonald during their thorough search of his house. *Id.* The prosecutor, concerned over the inferences the jury might draw from the fruitlessness of the search, offered an offsetting inference. *Id.* With his questions on direct examination and his comments in rebuttal argument, the prosecutor suggested that in the four hours between the departure of Head and Burns and the execution of the search warrant, McDonald had destroyed all incriminating evidence in his house. *Id.* It was "the manner in which this was done," observed the panel, that was "the cynosure of [its] inquiry." *Id.*

During the direct examination of the Secret Service agent who had taken part in the surveillance and in the search, the prosecutor developed the facts in support of the destruction-of-evidence theory. *Id.* After the agent described the surveillance, the arrests of Head and Burns, the retrieval of the garbage bag and the securing of the search warrant, the following exchange occurred:

> Q: When you arrived to execute the warrant, who was present?
> A: When I arrived, the special agent in charge of the Birmingham Secret Service, Thomas L. Jones, was there, Agent Novak, Mr. Charles Tarter, and
> Q: Who was he?
> A: He was an attorney representing Mr. McDonald. Mr. McDonald was there, and a lady who lived there, Brenda Evans.

Id. at 561-562. The prosecutor knew what the answer would be when he interrupted the agent to ask him to identify Tarter; he wanted the jury to know Tarter was McDonald's attorney. *Id.* at 562. The predicate thus was laid for the following comments

by the prosecutor in the rebuttal phase of closing argument:

> Now, ladies and gentlemen, you know here is you have seen the Secret Service agents, and here is Jimmy McDonald in his house. And here is all this commotion going on around his house, and then three hours later they arrive to serve the search warrant at 5:30 that afternoon. And who was there? The defendant's attorney. And that is when they went in the house to search him, three hours. I suggest to you ladies and gentlemen, I'm not going to tell you what my opinion is, but I suggest to you if Jimmy McDonald knew all this was going on, and had his lawyer out there three hours later, I believe that would be sufficient time to dispose of any ashes or any evidence, if you were so inclined. (emphasis ours).

Id.[7] McDonald argued that the prosecutor used the fact that his lawyer was present during the search as a basis for an inference of guilt, impermissibly penalizing him for exercising his constitutional right to counsel. *Id.* The government responded that its tactics were proper, and that even if those tactics were in error, given the other evidence against McDonald, the error was "harmless beyond a reasonable doubt." *Id.* Furthermore, although McDonald's attorney did not object to the prosecutor's arguments, the Fifth Circuit noted that "[b]ecause the alleged errors affect[ed] McDonald's substantial constitutional rights, [the Court] may notice them even though they were not brought to the trial court's attention. *Id.* (citing Fed.R.Crim.P. 52(b)).

Referring to *Griffin v. California*, 380 U.S. 609 (1965) and *Doyle v. Ohio*, 426 U.S. 610 (1976), the panel observed that

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[7] Although the opinion makes reference to it, no emphasis is discernible from a reading of the opinion.

"[t]he Supreme Court has held that prosecutorial comments on an accused's failure to testify" or "on his silence at the time of his arrest," infringe upon his Fifth Amendment right against compulsory self-incrimination. *Id.*, n. 2,3. It noted that while the Supreme Court has not yet addressed the effect of prosecutorial comments on an accused's exercise of his right to counsel, the Third, Eighth and D.C. Circuits have. *Id.* at 562.[8] "The implication that McDonald had destroyed incriminating evidence," added the panel, "struck at the jugular of his exculpatory story, the essence of which was that there was no evidence to destroy." *Id.* The Fifth Circuit explained that its decision in *McDonald* "fully extend[ed]" this reasoning "to cases involving comments on a defendant's exercise of his right to counsel," and that "[t]he dividing line...separates comments that 'strike at the jugular' of a defendant's story and those dealing only tangentially with it.'" *Id.* The Fifth Circuit concluded that "the real purpose of the reference to the attorney's presence was to cause the jury to infer that McDonald was guilty." *Id.* "The reference therefore penalized McDonald for exercising his Sixth Amendment right to counsel." *Id.* The Court added that "[u]nfortunately, it is difficult, if not impossible, to sanitize the comments so as to

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[8] Citing *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir. 1973)("murder conviction reversed because the prosecutor had claimed in his closing argument that the defendant's actions immediately after the commission of the crime, including his hiring of an attorney, were inconsistent with his claim of innocence," further holding "that the evidence in the case was such that the error could not be considered harmless."); *United States v. Liddy*, 509 F.2d 428 (D.C.Cir.1974) and *United States v. Williams*, 556 F.2d 65 (D.C.Cir.1977)("the court found error in references to the defendants' exercise of their right to counsel but held that the errors were harmless."); *Zemina v. Solem*, 573 F.2d 1027 (8th Cir. 1978)("the court, without discussing the issue of harmless error, reversed a manslaughter conviction because the prosecutor had suggested that the defendant's post-arrest telephone call to his lawyer indicated his guilt)).

remove the taint." *Id.* "Inherent in the comments is the barb that the lawyer caused, aided in or, at the very least, tolerated the destruction of evidence," and therefore, "[t]he comments affected the fairness of McDonald's trial." *Id.* More specifically, "[t]he comments were likely to give rise, in the average juror's mind, to at least three inferences: (1) McDonald's attorney acted illegally or unethically, (2) defense counsel generally in criminal cases act illegally or unethically, and (3) McDonald would not have gotten a lawyer unless he was guilty." *Id.* While the prosecutor convinced the Fifth Circuit that "he did not intend the first inference [9]...[n]o prosecutor, however, may impugn the integrity of a particular lawyer or that of lawyers in general, without basis in fact, as a means of imputing guilt to a defendant." *Id.* "It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel." *Id. McDonald's* holding has been cited with approval by the First (*United States v. Daoud*, 741 F.2d 478, 480 (1st Cir. 1984)), Third (*United States v. Thame*, 846 F.2d 200, 206 (3rd Cir. 1988)), Fourth (*United States v. Ollivierre*, 378 F.3d 412, 420 (4th Cir. 2004)(reversed on *Booker* grounds, 543 U.S. 1112 (2005)), Sixth (*Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990), Ninth (*United States v. Kallin*, 50 F.3d 689, 693 (9th Cir. 1995); *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983)), and Eleventh (*Hill v. Turpin*, 135 F.3d 1411, 1414 (11th Cir. 1998); *United States v. Frazier*, 944 F.2d 820,824 (11th Cir. 1991)) Circuits, and two Texas appellate courts. *See Sunday v. State*, 745 S.W.2d 436, 440 (Ct. App. Beaumont – 1988)("An argument attacking defense counsel in an effort to inflame the minds of the jury to the accused's prejudice can not be condoned."); *Rasmussen v. State*, 822

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[9] "Had he intended it," noted the panel, "he would have been obliged to report the unethical or illegal conduct." *Id.*

S.W.2d 707, 711 (Ct. App. Fort Worth – 1991)(recognizing *McDonald's* holding, but finding it inapplicable to its facts). *Compare Sulie v. Duckworth*, 689 F.2d 128, at 130 (7th Cir. 1982). [10]

As to the government's harmless error argument, the Court recognized that while "[v]iolations of some constitutional rights may be considered harmless errors (citing *Chapman v. California*, 386 U.S. 18; (1967), [h]owever, 'there are some

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[10] In *Sulie*, the Seventh Circuit agrees that a defendant can be deprived of counsel through improper arguments by a prosecutor, but parts with *McDonald's* reliance on the Sixth Amendment right to counsel as the authority for this proposition, Sulie complained on appeal that at trial the prosecutor commented on his request for a lawyer during interrogation, in order to demonstrate his sanity in committing a killing, and that this violated his "liberty without due process of law." *See Sulie v. Duckworth*, 689 F.2d 128, at 130 (7th Cir. 1982). The panel observed that "some cases decided since *Moore* [*v. Illinois*, 434 U.S. 220 (1977)] hold, but without citing *Moore* or elaborating the basis of their holding, that the Sixth Amendment right to counsel attaches prior to the filing of any charge," and, with reference to *McDonald*, that "these decisions cannot be regarded as authoritative, in light of *Moore*; and they are certainly not the law of [the Seventh Circuit]. *Id.* at 130. While Mr. Gonzales concedes that at the time he consulted with Mr. Rodriguez on March 4th, Mr. Gonzales' right to counsel had not yet attached, this is irrelevant.

First, Mr. Gonzales disagrees with *Sulie's* characterization that in *McDonald*, the Fifth Circuit recognized the right to counsel as attaching prior to a critical stage; the panel made no such representations. Furthermore, the facts in *Sulie* are clearly distinguishable from those in *McDonald* and even more so with the facts in our case. Whereas in *Sulie* the prosecutor made an isolated reference to Sulie's simple request for any counsel, in *McDonald*, the prosecutor's references to counsel involved McDonald's trial lawyer *during trial*. Far worse, in Mr. Gonzales' case, the prosecutor not only made direct references to Gonzales consulting and hiring Mr. Rodriguez because he was guilty, but actually made direct and repeated accusations that Mr. Rodriguez actively counseled Mr. Gonzales to present a fraudulent defense, and exposed privileged information, which obliterated his effectiveness, and with it, his function as Mr. Gonzales' counsel, in the eyes of the jury.

constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Id.* (citing *Chapman* at 23). The panel "considered the error in [*McDonald*] to be harmful per se." *Id.* (referring to *Hammond* at 564). It elaborated that "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error." *Id.*

The actions of the prosecutor in *McDonald* pale in comparison to the prosecutor's actions in Mr. Gonzales' case. Unacceptable as the actions by the prosecutor were in *McDonald*, his account about the defense lawyer's presence during the execution of the warrant at McDonald's house was at least factually accurate. In our case, there was no evidence at all that Mr. Gonzales even met with Rodriguez on March 4th, much less that the two discussed the subject of Mr. Gonzales' statement, or worse, that Mr. Gonzales consulted with, or was aided by Mr. Rodriguez to prepare a false statement. The prosecutor divined his claims entirely from information contained in a document titled "Schedule F, Political Expenditures," which illustrated nothing more than a copy of a check, prepared by Mr. Gonzales, and made out to "Fred Rodriguez," for "legal services," in the amount of $200.00 dollars, dated "3-04-02." *See* RR Vol. 12, tab 21, page 10 (page not numbered – count from beginning of tab). The prosecutor was no more certain that the check had been handed by Mr. Gonzales to Mr. Rodriguez on March 4th, that the two even met, that they discussed the case, and much less that they conspired to hatch up a defense, prior to the meeting with the Texas Ranger, any more than he was about the possibility that the check could have been mailed by Mr. Gonzales to Mr. Rodriguez for payment of traffic tickets!

Furthermore, the comments in *McDonald* began and ended by a reference to his lawyer's presence during the search of the McDonald's house. Notably, the prosecutor convinced the Fifth Circuit panel that he did not intend to accuse trial counsel

of acting illegally or unethically (*See McDonald* at 562), in our case, the prosecutor not only alleged unethical conduct, he directly accused Mr. Rodriguez of committing a fraud on the court and the jury. More specifically, he began his attack by telling the jury that the statement given by Mr. Gonzales to the Texas Ranger had "been a part of an orchestrated plan" by him to then claim that he "was really working with law enforcement," and that he had "been working on this defense for a long time." He then targeted Mr. Rodriguez, when he claimed that Mr. Gonzales consulted with Mr. Rodriguez prior to, and on the same day that he visited with the Ranger with a foam-board exhibit, in chronological order, Mr. Gonzales' "acts," beginning with the preparation of his "false" statement, and culminating with the events on March 4th, which in one sentence read: "[Mr. Gonzales] meets with attorney Fred Rodriguez and provides a sworn statement to Texas Ranger Shawn Palmer."

But while the prosecutor's actions more than met the *McDonald* test to constitute harm per se, and thus merited automatic reversal, the lethality of the attack took on a new dimension from the fact that, as it turns out, a pellet from the prosecutor's shotgun blast did find a target. Mr. Gonzales had actually met with Mr. Rodriguez on March 4th, 2002.

II. THE FOURTH COURT OF APPEALS OF TEXAS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE SUPREME COURT'S DECISION IN *WEATHERFORD V. BURSEY*, 429 U.S. 545 (1977), WHERE THIS COURT RECOGNIZED THAT A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL MAY BE VIOLATED BY THE STATE'S INTRUSION INTO THE ATTORNEY-CLIENT RELATIONSHIP, BECAUSE WITHOUT WARNING, AND WITHOUT LEGAL OR FACTUAL

JUSTIFICATION, HE EXPOSED MATTERS TO THE JURY THAT WERE COVERED BY THE ATTORNEY-CLIENT PRIVILEGE, WHICH PREJUDICED MR. GONZALES' DEFENSE:

In *Weatherford v. Bursey*, the Supreme Court recognized that under some circumstances a defendant's Sixth Amendment rights may be violated by the state's intrusion into the attorney-client relationship. *See Weatherford v. Bursey*, 429 U.S. 545 (1977). In that case, Weatherford, an undercover law enforcement agent, was arrested and indicted along with the defendant, Bursey, in order to maintain Weatherford's cover. Under the belief that Weatherford was Bursey's codefendant, Bursey's attorney asked Weatherford to attend certain trial preparation sessions. Weatherford then testified for the prosecution at trial, but never referred to the preparatory sessions in any way. Bursey was subsequently convicted. In rejecting Bursey's Sixth Amendment claim, the Court found that although Weatherford had attended meetings involving the attorney-client privilege, "[a]t no time did Weatherford discuss with or pass on to his superiors or to the prosecuting attorney or any of the attorney's staff "any details or information regarding the plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff." *Id.* at 548.

In *Shillinger v. Haworth*, 70 F.3d 1132, 1138 (10th Cir. 1995) the Tenth Circuit affirmed the granting of habeas relief to inmate Haworth who complained that the prosecution gained information covered by the attorney-client privilege during meetings with his attorney, from a deputy who was instructed to relay all such information by the prosecutor, and which was later used by the prosecutor at Haworth's trial. The district court had found that the prosecutor's actions violated Haworth's Sixth Amendment right to counsel. In support of its affirmance, the panel distinguished its facts from those in

Weatherford, where this Court wrote: "Unless Weatherford communicated the substance of the...conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to the State, there can be no Sixth Amendment violation...There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment..." *Shillinger* at 1139 (citing *Weatherford* at 557-558.

The remedy for this type of transgression was addressed by Justice White in *United States v. Morrison*, who also authored *Weatherford*. *See United States v. Morrison*, 449 U.S. 361 (1981). There, the Supreme Court considered whether dismissal of the defendant's indictment with prejudice was an appropriate remedy for the intentional intrusion upon her Sixth Amendment rights by federal law enforcement agents. Recognizing "the necessity for preserving society's interest in the administration of criminal justice," the Court enunciated the following standard: "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 364. The Court described how similar constitutional violations have generally been remedied:

> When before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted...Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective

assistance of counsel and a fair trial.

Id. at 365 (citations omitted). Because the federal agents received no information from Morrison, and because they otherwise failed to affect her relationship with her attorney, the Supreme Court held that there was no basis for imposing a remedy in that case, "much less" dismissal of her indictment. 449 U.S. at 366-67.

In our case, the prosecutor's baseless claims about the meeting between Mr. Gonzales and Mr. Rodriguez compelled the latter to concede that the meeting had taken place, all of which happened within a matter of minutes, right before the jury, and turned the attorney client-relationship on its head. Perhaps because he was aware of no wrongdoing by Mr. Rodriguez, and that the subject would not have gone far if raised in camera before the trial court, he instead chose to surprise Mr. Rodriguez, by launching his tirades directly in front of the jury. At that point, with the proverbial "cat out of the bag," an objection by Mr. Rodriguez would have been fruitless, especially since he could not claim that any such meeting did not take place. Mr. Rodriguez was left with Hobson's choice; lay low and avoid bringing attention to the subject in hopes that it will be disregarded, or explain as best he could that the meeting was not for the purpose of preparing a false statement and the beginning of his role as aider and abettor of a fraudulent defense, without sacrificing the attorney-client privilege. He chose the latter. He devoted part of his closing to dispel any appearance of wrongdoing on his part, by noting that "[t]here [was] no evidence...as to what took place [at the meeting]," which created an irremediable suspicion from the jury about why the attorney would refuse to divulge the subject of the meeting. Mr. Rodriguez was so shaken by the prosecutor's actions, that he felt compelled to actually concede: "...sometimes we unwittingly help each other. We don't intend to, but we do. I had forgotten this point, I had forgotten that Jesse Gonzales came to see, according to the evidence, Fred

Rodriguez, and you are probably guessing it's me, and it would probably be a good guess." At that moment, Mr. Rodriguez was confronted with the three inferences sagely identified by Justice Politz in *McDonald* that the prosecutor's comments were likely to give rise in the juror's minds; that Mr. Rodriguez acted illegally or unethically, that criminal defense lawyers generally in criminal cases act illegally or unethically, and that Mr. Gonzales would not have met with Mr. Rodriguez on March 4th, unless he was guilty. *See McDonald* at 564.

Because of the attorney-client privilege that governed the meeting and communications between Gonzales and Mr. Rodriguez, Mr. Rodriguez was forced to explain that he could not divulge the subject of his meeting with Mr. Gonzalez. Understandably, he was then forced to argue that no "criminal lawyer who talks to a person that says he's going to go talk to the Texas Rangers is going to let him go, if he's going to go and confess to crime...Do you think anybody would let that happen...Do you think he intended to go out there and confess to a crime after having talked to a criminal defense attorney?" Ironically, in an effort to protect Mr. Gonzales from any suspicions, Mr. Rodriguez needed to distance himself from his client, when he added: "But we know one thing. He showed up at the Ranger Office by himself. No lawyer with him. By himself." From that moment on, Mr. Rodriguez joined his client in becoming the focus of a conspiracy to deceive law enforcement, and that day, the jury. Because the jury was infected beyond repair, the only remedy, in accordance with *Morrison*, is the reversal of Mr. Gonzales' convictions.

Shillinger, however, presents yet another possible remedy for the prosecutor's transgressions. After affirming the district court's granting of habeas relief, relying on *Morrison*, the Tenth Circuit remanded the case so that the habeas judge determine whether the taint of the prosecutor's actions could infect Haworth's retrial, and require not only the retrial initially

ordered by the trial court, but actual dismissal with prejudice. *See Shillinger* at 1143.

But the prosecutor was not finished yet. Unsatisfied, and perhaps emboldened by Mr. Rodriguez' concession, the prosecutor fueled his efforts to maximize Mr. Gonzales' sentence during the punishment phase, by launching even more pointed and blatant accusations in the plural construct, accusing Mr. Rodriguez ofhelping his Mr. Gonzales log down and count any "little tid bit of information," so that when they "finally get to Court on this deal," they "will be able to say that [Mr. Gonzales] was cooperating." As it pertains to the timing of his allegations, the prosecutor's message was the last impression he left on the jury before ceding the floor to Mr. Rodriguez during the guilt-innocence phase, and the last message heard by the jury before it deliberated on Mr. Gonzales' punishment. Mr. Rodriguez faced insurmountable odds; admitting to a meeting that became, subsequent to the prosecutor's tirade, the previously "secret meeting"; protecting his confidences with his Mr. Gonzales while thwarting direct accusations of wrong doing, all the while battling the common, and popular misconceptions about criminal defense lawyers that this Court is well aware exist; and lest we forget, trying to defend his client at trial. With one swipe, the prosecutor destroyed Mr. Rodriguez' credibility, and with it, his effectiveness as Mr. Gonzales' advocate. With his lawyer engaged in his own fight to salvage his credibility, Mr. Gonzales was left alone before the jury, essentially lost amidst a stench too strong to dissipate.

Because the right to counsel is, as stated in *Strickland*, the right to the effective assistance of counsel, and because the prosecutor's actions occurred during the ever-so critical summation stages of the guilt-innocence and punishment phases of Mr. Gonzales trial (the deprivation of which itself represents a Sixth Amendment violation meriting automatic reversal, as held in *Geders*), Mr. Gonzales was effectively stripped of his lawyer at trial. Mr. Gonzales' case provides the

ideal facts with which to convince this Honorable Court to grant his petition for writ of certiorari, recognize that his right to counsel was stripped by the prosecutor's malicious and unfounded accusations during closing arguments, and that the prosecutor's actions amount to error that is harmful per se, thus meriting a reversal of his convictions.

CONCLUSION

This Court cannot allow the criminal trial process to degenerate to the degree caused by the prosecutor, and as allowed by a passive trial judge. By granting Mr. Gonzales' petition, this Court can send a clear message that prosecutors are prohibited from any attempts to strip the accused of their counsel at trial, as a means to obtain a conviction.

For the foregoing reasons, the Petitioner, Jesse Hinojosa Gonzales, respectfully prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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May 2nd, 2006

APPENDIX

Jesse Hinojosa GONZALES, Appellant v. The STATE of Texas, Appellee

No. 04-03-00563-CR

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

2005 Tex. App. LEXIS 6547

August 17, 2005, Delivered
August 17, 2005, Filed

PRIOR HISTORY: From the 175th Judicial District Court, Bexar County, Texas. Trial Court No. 2002-CR-6972-C. Honorable Mary Roman, Judge Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For Appellant: Jorge G. Aristotelidis, Attorney at Law, San Antonio, TX.

For Appellee: Kevin P. Yeary, Assistant Criminal District Attorney, San Antonio, TX.

JUDGES: Opinion by: Sarah B. Duncan, Justice. Sitting: Alma L. Lopez, Chief Justice, Sarah B. Duncan, Justice, Phylis J. Speedlin, Justice.

OPINIONBY: Sarah B. Duncan

OPINION: MEMORANDUM OPINION

Jesse Hinojosa Gonzales appeals the trial court's judgment convicting him of two counts of bribery and one count of money laundering, sentencing him to twelve years' confinement on each count of bribery and ten years' confinement on the money laundering count, and fining him $ 10,000.00 on each count. We affirm the trial court's judgment.

1. In his first and ninth points of error, Gonzales argues the prosecutor violated his Sixth Amendment right to counsel by making improper arguments to the jury. The State, recognizing that we generally do not review for prosecutorial error but for trial court error, responds that Gonzales has failed to show trial court error because he failed to object in, and obtain a ruling from, the trial court. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) [*2] (holding "a defendant's failure to object to a jury argument or a defendant's failure to pursue to an adverse ruling his objection to a jury argument forfeits his right to complain about the argument on appeal"), *cert. denied*, 520 U.S. 1173, 137 L. Ed. 2d 548, 117 S. Ct. 1442 (1997). In response, Gonzales argues that *Cockrell* does not apply because his "points of error one and nine are premised on the position that a criminal defendant can be stripped of his counsel, not only through the outright denial of the physical presence of a lawyer in the courtroom, but [also] through the egregious attacks of a prosecutor during closing argument, as occurred in [] Gonzales'[s] case both during the guilt-innocence and punishment stages of his trial." In support of this argument, Gonzales relies principally upon *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980), in which McDonald argued "that the prosecutor used the fact that his lawyer was present during the search as a basis for an inference of guilt, impermissibly penalizing him for exercising his constitutional right to counsel." *Id.* at 562. The court held it could "notice [the alleged errors] [*3] even though they were

not brought to the trial court's attention" because they "affect McDonald's substantial constitutional rights." *Id.* In support of its holding, the court cites Federal Rule of Criminal Procedure 52(b), which expressly permits consideration of "plain error that affects substantial rights" "even though it was not brought to the court's attention." FED. R. CRIM. P. 52(b). The Texas Court of Criminal Appeals also recognizes that certain errors are fundamental and need not be preserved. *See Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997). However, the court has expressly held that this class of errors does not include improper jury argument, even when it is argued to infringe upon a defendant's exercise of his constitutional right to counsel. *See Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004)(holding that defendant's failure to object waived complaint "that the prosecutor erred by arguing at the guilt or innocence phase [*4] in such a way as to strike at appellant over the shoulders of his counsel"). We are bound by *Threadgill* and therefore hold that, by failing to object, Gonzales waived the complaints encompassed by his first and ninth points of error.

2. In his second and fourth points of error, Gonzales argues the application paragraph on the money laundering count eliminated the presumption of innocence on the bribery count and commented on the weight of the evidence by instructing the jury that Gonzales "received money from a bribe." As the State points out, however, Gonzales's argument ignores that the paragraph opens and closes with "if":

> Now, ***if*** you find from the evidence beyond a reasonable doubt that on or about the 5th day of November, A.D., 2001, in Bexar County, Texas, the defendant, Jesse Gonzales, did knowingly acquire or maintain an interest in or possess the proceeds of criminal activity, to-wit, bribery, a felony in the State of Texas, in which Jesse

> Gonzales received money from a bribe while he was a public servant, namely, an elected Trustee for the Alamo Community College District, and the value of said funds was three thousand dollars ($ 3,000) or more but [*5] less than twenty thousand dollars ($ 20,000), then you will find the defendant guilty of money laundering as charged in Count III of the indictment.
>
> ***If*** you do not so find from the evidence beyond a reasonable doubt or if you have a reasonable doubt thereof, you will find the defendant not guilty in Count III of the indictment.

(Emphasis added). When read in context, the complained-of language obviously did not declare that Gonzales was guilty of bribery but explained to the jury that the State was required to prove the predicate crime of bribery to prove money laundering. We therefore overrule Gonzales's second and fourth points of error.

3. In his third point of error, Gonzales argues the "accumulation of error" complained of in his first and second points constitutes fundamental error requiring reversal. However, because Gonzales has not supported his contention with any authority, he has presented nothing for review. *See Boler v. State*, 177 S.W.3d 366, 2005 Tex. App. LEXIS 2719, No. 01-04-00234-CR, 2005 WL 825900 at *6 (Tex. App.-Houston [1st Dist.] April 7, 2005, no pet. h.)(citing TEX. R. APP. P. 38.1(h)). More importantly, because Gonzales's first and [*6] second points of error are without merit, they cannot yield an "accumulation of error." We therefore overrule Gonzales's third point of error.

4. In his fifth point of error, Gonzales contends the money laundering statute, TEX. PEN. CODE ANN. § 34.02(a)(1), is facially unconstitutional because it "omits [the mens rea requirement] that a person have knowledge that the

proceeds in question be of criminal activity, and therefore it encourages arbitrary arrests and convictions of people who engage in otherwise innocent conduct." We disagree. Under *section* 34.02(a)(1), a person commits the offense of money laundering if the person "knowingly acquires or maintains an interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal activity." TEX. PEN. CODE ANN. § 34.02(a)(1) (Vernon 2003). Section 34.02(a)(1) thus requires that the person know the proceeds are derived from criminal activity. *See Lee v. State*, 29 S.W.3d 570, 576 (Tex. App.-Dallas 2000, no pet.) (noting that defendant would be guilty of money laundering if jury believed he knew money was "dirty money" and rational jury could [*7] have so found). Accordingly, we overrule Gonzales's fifth point of error.

5. Gonzales voluntarily withdraws his sixth point of error.

6. In his seventh point of error, Gonzales argues his "conviction for money laundering must be vacated because it is a lesser included offense of bribery, resulting in multiple punishment, in violation of the double jeopardy clause" of the federal constitution. We again disagree. Multiple punishments arising out of the same criminal conduct are constitutionally permissible if each of the crimes "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *see also Ex parte Goodman*, 152 S.W.3d 67, 70 n.5 (Tex. Crim. App. 2004), *cert. denied*, 162 L. Ed. 2d 867, 125 S. Ct. 2940 (2005). Here, Gonzales was indicted and ultimately convicted of bribery under *section* 36.02(a)(1), (4) of the Texas Penal Code and money laundering under section 34.02(a)(1). Under *section* 36.02(a)(1), (4) a person commits bribery If:

> he intentionally or knowingly offers, confers, or agrees to confer on another, [*8] or solicits, accepts, or agrees to accept from another:

> (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;
>
> ...
>
> or (4) any benefit that is a political contribution as defined by Title 15, Election Code, or that is an expenditure made and reported in accordance with Chapter 305, Government Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion if such exercise of official discretion would not have been taken or withheld but for the benefit; notwithstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision

TEX. PEN. CODE ANN. § 36.02(a)(1), (4) (Vernon 2003). Under section 34.02(a)(1), a person commits money laundering if he "knowingly acquires or maintains an interest in, receives, conceals, possesses, transfers, or transports the proceeds of criminal [*9] activity." *Id.* § 34.02(a)(1).

Bribery and money laundering thus both require the same culpable mental state - "knowingly" - and the same culpable act - "receive[]" or "accept[]." However, the commonality ends there. Even assuming the greatest possible overlap, it is still clear that each statute requires proof of at least one element the other does not: money laundering, but not bribery, requires the involvement of proceeds of a criminal activity; and bribery, but not money laundering, requires an exercise and perversion of official discretion by the benefit offered or received, the involvement of a public servant, party

official, or voter, and a benefit that is a political contribution or expenditure. Because bribery and money laundering each requires proof of a fact that the other does not, multiple punishments arising out of the same criminal conduct are not constitutionally prohibited. Accordingly, we overrule Gonzales's seventh point of error.

6. In his final point of error, Gonzales argues the trial court erred in failing to declare a mistrial after the prosecutor made the following argument:

> Now you know the facts, now you know the severity of the actions. You [*10] know this wasn't a guy taking one step over the line and making a mistake. You know this isn't a guy who accepted responsibility for his crime, which is extremely important. Who deserves probation? Think before you even consider probation the person has to say, I did it. I'm sorry. I won't do it again. And if you believe him, he gets probation.

Although the trial court sustained Gonzales's objection and instructed the jury to disregard the prosecutor's comments, it denied Gonzales's motion for a mistrial. On appeal, Gonzales argues the trial court abused its discretion in denying his motion because the prosecutor's argument was an impermissible comment on his exercise of his right not to testify at the punishment phase. *See Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004) (abuse of discretion standard). However, even if denying Gonzales's motion were error, it would not be reversible error unless the trial court's instruction to disregard failed to cure the improper argument's prejudicial effect. *See Wilkerson v. State*, 881 S.W.2d 321, 327 (Tex. Crim. App.), cert. denied, 513 U.S. 1060, 130 L. Ed. 2d 604, 115 S. Ct. 671 (1994). [*11] An instruction fails to cure the improper argument's prejudicial effect only in the most blatant cases. *Moore v. State*, 999 S.W.2d 385, 405 (Tex. Crim.

App. 1999), cert. denied, 530 U.S. 1216, 147 L. Ed. 2d 252, 120 S. Ct. 2220 (2000). Although not expressly adopted as exhaustive or definitive, the Texas Court of Criminal Appeals has relied on the following factors to determine whether an instruction to disregard cured the prejudicial effect of the comment: (1) the nature of the error, (2) the persistence of the prosecution in committing it, (3) the flagrancy of the violation, (4) the particular instruction given, (5) the weight of incriminating evidence, and (6) the harm to the accused as measured by the severity of the sentence. *Waldo v. State*, 746 S.W.2d 750, 754 (Tex. Crim. App. 1988). We shall also rely on these factors.

Even if we assume the nature of the error here was a direct comment on Gonzales's failure to testify, the prosecutor made only one such comment; it was neither persistent nor flagrant. Immediately after the comments, the trial court instructed the jury to "please disregard those comments." At the punishment phase, the State re-offered the evidence [*12] presented at the guilt stage. This evidence included: a landowner's testimony that Gonzales wanted a $ 7,500 bribe in exchange for Gonzales's support, as a member of the Alamo Community College District Board (the "Board"), for the purchase of the landowner's property; an architect's testimony that Gonzales wanted $ 20,000 from him in exchange for Gonzales's support to approve his hiring for a multi-million dollar renovation project; the former chairman of the Board's testimony that Gonzales was asking the landowner for a bribe and that he provided Gonzales with $ 5,000 as a down payment on the $ 20,000 Gonzales wanted from the architect; a newspaper writer's testimony that Gonzales verified to her that he had received a $ 5,000 bribe; a Texas Ranger's testimony that Gonzales voluntarily provided a written statement admitting he sought a bribe from the landowner and received $ 5,000 from the former chairman of the Board as a portion of the money the architect owed him for his support; and Gonzales's

own testimony claiming that as part of his own undercover sting operation to root out corruption, he solicited money from the landowner and from the architect and accepted the $ 5,000 money [*13] from the former chairman of the board in exchange for his vote on district matters. Rejecting Gonzales's request for community supervision, the jury assessed a twelve-year sentence on each count of bribery, a ten-year sentence on the money laundering count, and three separate $ 10,000 fines for each count. Although each of the twelve-year sentences is approximately half of the maximum for bribery, the ten-year sentence for money laundering is, given the amount of money laundered, the maximum permitted. Likewise, each of the $ 10,000 fines is the maximum permitted.

In light of the overwhelming evidence supporting the jury's verdict of guilty, as well as its assessment of punishment in a manner consistent with the evidence, we conclude that the prosecutor's impermissible comment was not so prejudicial that it could not be and was not cured by the trial court's prompt instruction to disregard. We therefore hold the trial court did not abuse its discretion in denying Gonzales's motion for a mistrial. *See Moore, 999 S.W.2d at 405-06* (holding harm from comment on defendant's failure to testify cured by instruction to disregard). Accordingly, we overrule Gonzales's final [*14] point of error.

The trial court's judgment is affirmed.

Sarah B. Duncan, Justice

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JESSE HINOJOSA GONZALES

PD-1410-05

COURT OF CRIMINAL
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2006 Tex. Crim. App. LEXIS 198

February 1, 2006, Decided

PRIOR HISTORY: FROM BEXAR COUNTY - 04-03-00563-CR. Gonzales v. State, 2005 Tex. App. LEXIS 6547 (Tex. App. San Antonio, Aug. 17, 2005)

OPINION: Appellant's Petition for Discretionary Review Refused